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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE, PENSION BENEFIT GUARANTY CORPORATION

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE, PENSION BENEFIT GUARANTY CORPORATION

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support

of Appellee. Copies of letters written by counsel for Appellant and Appellee granting the parties' consent to this submission are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), pursuant to the written consent of the parties, submits this brief urging affirmance of the decision of the Three Judge Court below sustaining the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA")[1] against attack under the Takings Clause of the Fifth Amendment to the Constitution and also sustaining the multiemployer pension insurance program, including the imposition of premiums, against constitutional attack. The NCCMP is a tax-exempt, non-profit corporation organized to represent the interests of the more than eight million workers who participate in collectively bargained multiemployer plans. The NCCMP's affiliates include over 140 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans.

The NCCMP actively participated throughout the development and Congressional consideration of the MPPAA. It is our belief that such legislation, including the provisions challenged here, is essential to the stability of multiemployer pension plans and to the viability of the federal pension benefit guaranty program established by Title IV of ERISA. If the Three Judge Court's decision is not sustained we are concerned that the result

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[1] Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980). The withdrawal liability provisions of the MPPAA, which added Sections 4201 through 4225 to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), are codified at 29 U.S.C. §§ 1381-1405.

will be to disrupt severely the operation of multiemployer pension plans and endanger the retirement security of millions of American workers who participate in them.

SUMMARY OF ARGUMENT

The imposition of withdrawal liability is not a taking of property, but a consequence of permissible Congressional regulation of "the benefits and burdens of economic life."

The MPPAA was enacted to counteract a real threat to the vitality and stability of our system of private multiemployer pension plans. The Act distributes the burden of preserving the system equitably among all participants, and the manner of regulation chosen by Congress is rationally related to the legislative purpose.

The enactment of the MPPAA has not only affected employers withdrawing from multiemployer plans. In addition, multiemployer plans must pay increased premiums which are necessary to preserve the PBGC financial guaranty program, and plan participants must accept lower guarantees and reduced benefits in the event of a plan termination.

The Court's analysis of cases under the Takings Clause is similar to the approach it has taken in Due Process Clause cases. Congress has substantial power to regulate for the public good, and economic legislation, such as that being challenged here, is to be viewed with a presumption of constitutionality. So long as Congress has legitimate objectives it has the power, even with respect to "vested property rights," to impose new regulatory constraints on the way in which those rights are used. Moreover, even where property has been severely diminished in value, the Court has consistently held that no taking has occurred where, as here, the governmental action was to promote "health", "safety", and "morals" or "the general welfare".

In addition to analyzing the character of the governmental action at issue, the Court also considers the economic impact of the regulation and the "interference with investment-backed expectations." In this case there has been no disproportionate economic impact; employers, employees and the plans themselves are all affected by the regulation. And, the "investment-backed expectations" which Appellants seek to protect is—when all is said and done—the right of employees to abdicate any responsibility to the plan without incurring liability. Surely, the Fifth Amendment was not designed to protect such an interest.

To say that the imposition of withdrawal liability is a taking would eviscerate Congress' power to legislate for the public welfare.

ARGUMENT

THE WITHDRAWAL LIABILITY PROVISIONS OF THE MPPAA ARE ESSENTIAL TO THE STABILITY OF MULTIEMPLOYER PLANS AND THE VIABILITY OF THE FEDERAL BENEFIT GUARANTY PROGRAM AND THEIR ADOPTION AS PART OF A COMPREHENSIVE MEASURE TO FOSTER THOSE OBJECTIVES DOES NOT VIOLATE THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

The evolution of the Court's application of the Takings Clause to the facts of American economic life demonstrates a fundamental understanding that government's role in our society is to govern. Government cannot perform this function without every member of our society understanding that the benefits of our democracy must be paid for; no liberties are complete nor does anyone have property rights which are totally unfettered.[2] As one learned commentator has noted, gov-

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[2] Chief Justice Hughes put it best in *West Coast Hotel Co. v. Parrish*, 300 U.S. 386, 391 (1937):

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the

ernment "mediates the disputes of various citizens and groups within the society . . . ." [3] Acting to resolve conflicts between competing alternatives,

> [government] says, as between neighbors, that one fellow must cease keeping pigs in his backyard or must cease making bricks at a certain location; as between management and labor it imposes a duty of collective bargaining; as between tenant and landlord it may adjust prices or impose certain standards for health and safety. The essence of [the government] function is that government serves as an arbiter, defining standards to reconcile differences among the private interests in the community.[4]

And, in analyzing the role of the Takings Clause that same commentator has concluded that "losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power." [5]

The Court has itself made clear that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Indeed, the Court has "recognized in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central Trans-*

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deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.

[3] Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 63 (1964).

[4] *Id.* at 62.

[5] *Id.* at 62, 63.

portation Co. v. City of New York, 438 U.S. 104, 124 (1978). And, most recently, the Court has stated that

> [e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

United States v. Madison D. Locke, 471 U.S. ——, 105 S.Ct. 1785, 1797 (1985). Moreover, just as in its analysis of alleged "Due Process" violations where the Court has established that "legislative Acts adjusting the burdens and benefits of economic life [are to be viewed] with a presumption of constitutionality . . .", *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), it is apodictic that for purposes of constitutional review under the Takings Clause,

> vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life.

Locke, supra, 105 S.Ct. at 1798.

Rather than establish a "set formula" for determining when a statute is rendered unconstitutional under the Takings Clause, the Court has articulated its preference to reach its judgment based upon "essentially, ad hoc, factual inquiries . . . ." *Penn Central, supra*, 438 U.S. at 124. Examination of the withdrawal liability provisions of the MPPAA and the Congressional rationale underlying their enactment demonstrates beyond a doubt that the constraints and duties which the statute imposes constitute a "reasonable restriction designed to further legitimate legislative objectives", that the statute is de-

signed to adjust and "redistribute the benefits and burdens of economic life", and that the legislative objective was carefully designed to "regulate for the public good." *Locke, supra*, 105 S.Ct. 1798. In meeting those tests there can be no question that the statute withstands Appellants' Takings Clause challenge.[6]

A. The Stability of Multiemployer Plans and the Viability of the Federal Benefit Guaranty Program Was Threatened By the Incentives for Withdrawal and Plan Termination Created by ERISA's Original Title IV Provisions.

1. *The Vulnerability of Multiemployer Plans and the Federal Benefit Guaranty Program.*

ERISA's enactment in 1974 established a comprehensive national policy to foster the financial soundness of private pension plans and to safeguard the benefits earned by participants in such plans. *See, e.g.*, 29 U.S.C. § 1001. Within a few years of ERISA's adoption, however, it had become clear that this policy was in serious jeopardy insofar as multiemployer plans and their eight million participants were concerned.

The financial crisis facing multiemployer plans was analyzed in a comprehensive report submitted to Congress by the PBGC in 1978 (the "PBGC Multiemployer Study")[7] and by numerous witnesses appearing during

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[6] The Court is already familiar with much of the foregoing analysis by virtue of its decision upholding MPPAA's retroactive withdrawal liability provisions on Due Process grounds in *PBGC v. R. A. Gray Co.*, —— U.S. ——, 104 S.Ct. 2709 (1984). Nonetheless, it is necessary to revisit the history of MPPAA and its overall statutory structure for purposes of a Takings Clause analysis here.

[7] The PBGC Multiemployer Study was submitted on July 1, 1978, pursuant to Congress' direction the previous year that the agency prepare a report concerning the anticipated condition of the multiemployer program. Pub. L. No. 95-214, 91 Stat. 1501 (1977). Following submission of that Study, the Administration, on May 3, 1979, sent to Congress its legislative proposals for restructuring the

Congressional hearings. Moreover, the provisions eventually enacted were the subject of lengthy deliberations by four separate Congressional committees, committee reports and floor debates. The extensive legislative record left no doubt that the economic stability of multiemployer plans was in danger and that the benefit guaranty program for multiemployer plans was headed for financial disaster.[8]

A basic element of the problem was that employers could withdraw from a multiemployer plan with no further responsibility for funding the benefit obligations left behind, unless the plan terminated within five years of such withdrawal. The pensions promised to those participants who had worked for a withdrawn employer still had to be honored. However, it was the remaining employers who had to fund the benefits of those participants who had worked for the withdrawn employers. Thus, the withdrawn employers shifted their economic burden from their own shoulders to the employers who stayed loyal to the plan.

Where employer withdrawals thrust sharply increased funding requirements on the remaining contributors, the effect would have been to drive out still more employers

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multiemployer program. Those proposals served as the basis for Congressional hearings and floor debates during 1979 and 1980.

[8] While the guaranty program was made immediately effective for single employer plans in 1974, the effective date for multiemployer plans was delayed until January 1, 1978, due to Congress' acknowledged uncertainty regarding the viability of this program for such plans. The 1978 effective date for the mandatory guaranty program was postponed on several successive occasions in order to provide time for the preparation and Congressional consideration of the PBGC Multiemployer Study and subsequent legislative proposals. *See, Peick v. PBGC ("Peick")*, 539 F. Supp. 1025, 1029-34 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 3554 (1984).

and discourage the entry of new contributors whose participation might otherwise have helped relieve the plan's funding burdens. As discussed below, the PBGC Multiemployer Study reported that this process of employer withdrawal and escalating funding costs to the remaining employers had already imperiled a number of multiemployer plans, and the threat to others was becoming increasingly apparent.

Accordingly, in presenting the Administration's legislative proposals to Congress, the Secretary of Labor, who is the Chairman of PBGC's Board of Directors, identified employer withdrawals and the resulting increased burden on remaining employers as the "key problem" of multiemployer plans.[9] Congress obviously agreed, expressly finding that

> [w]ithdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries . . . .

[29 U.S.C. § 1001a(a)(4)(A)]

The PBGC Multiemployer Study also warned that the existing employer liability provisions of Title IV were fundamentally flawed insofar as they applied to multiemployer plans. Not only would these provisions fail to support the viability of the guaranty program, but they could seriously undermine it by encouraging employer withdrawals and the termination of plans which might otherwise continue in operation.[10]

Under the original Title IV provisions a withdrawing employer would have been absolved of any liability even

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[9] *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate*, 96th Cong., 1st Sess 123 (1979). These hearings are hereinafter cited as "Senate Labor Committee Hearings."

[10] PBGC Multiemployer Study pp. 23-24; *see also* H.R. Rep. No. 889, Part I, 96th Cong., 2d Sess. 54-55 (1980).

if the plan should later terminate—so long as the employer withdrew at least five years before termination. On the other hand, employers who continued to participate in a plan that ultimately terminated would be liable to the PBGC.[11] Thus, once a plan got into financial difficulty, the 1974 law prompted contributing employers to "rush for the door" in the hope of escaping liability that would be triggered by the plan's potential future termination.[12] Moreover, employers who continued funding the plan would be punished while those who failed to continue to fund promised benefits were simply let off the hook.

The PBGC Multiemployer Study also pointed to another unfortunate incentive provided by the original employer liability rules. Since, upon plan termination, the liability of even those employers who remained in the plan could not exceed 30 percent of their net worth, there would be many occasions in which employers would find plan termination to be less expensive than the continuing obligation to make contributions. The fact that many multiemployer plans are established in service-oriented industries where employers can often operate with rela-

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[11] As enacted in 1974, ERISA provided that if a multiemployer plan terminated with insufficient assets to provide benefits at the level guaranteed by the PBGC, the insufficiency would be assessed against employers who had contributed during the five years preceding termination. The insufficiency was to be allocated among those employers on the basis of each employer's proportionate share of the total contributions required under the plan during the five-year period. Thus, the earlier within that five-year period that any employer withdrew, the less would be its proportionate share of total contributions, and therefore, its liability to the PBGC. The Act further provided that an employer's liability would in no event be greater than 30 percent of its net worth. *See*, 29 U.S.C. §§ 1362-1364.

[12] *See* H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 15 (1980); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S.1076).

tively low net worth, made this a very real prospect. Moreover, while active employees and their unions would normally be expected to resist employer pressure to terminate a plan, the knowledge that the PBGC would guarantee substantially all of the benefits earned by retirees could neutralize that resistance—particularly if the result were not only to eliminate contribution payments, but also make that money available to fund higher benefits for current workers.[13]

According to the PBGC's Multiemployer Study, a number of plans were already in serious financial difficulty due to the fact that withdrawing employers had left behind large liabilities which remaining contributors could ill afford to fund. Many of these plans were in industries where such factors as technological advances, foreign competition and changes in consumption patterns had resulted in protracted declines in the number of contributing employers.[14] Were the benefit guaranty program to go into full effect as originally structured, it was clear that significant numbers of those plans would terminate, with the potential of shifting large, uncontrolled costs onto the insurance program. Such increased costs to the pension guaranty system would have to be borne by other multiemployer plans through the payment of drastically increased premiums; those increased premiums would add

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[13] See PBGC Multiemployer Study, pp. 22-23; Statement of National Coordinating Committee for Multiemployer Plans; Senate Labor Committee Hearings, at 190; 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson).

[14] In addition to the analysis provided by the PBGC Multiemployer Study, the difficulties faced by plans in declining industries was discussed at length in the Congressional reports and debates. *See, e.g.*, H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 63 (1980); 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S. 1076).

financial burdens which in turn would make it more difficult for other plans to continue operations.[15]

In view of the problems disclosed by an extensive legislative record, Congress understandably found it essential to eliminate the incentives for employers to withdraw from multiemployer plans and leave others with the burden of funding the benefit obligations they left behind. To accomplish this and other objectives critical to the health and preservation of multiemployer plans it was clear that a substantial revision of existing law was required.

2. *Confirmation of the Threat to Multiemployer Plans and the Federal Benefit Guaranty Program by Representatives of Employers, Labor Unions and Covered Plans.*

Congress was not simply responding to "speculative" predictions of the PBGC Multiemployer Study. The likelihood of multiemployer plan terminations is amply demonstrated by the MPPAA's legislative history.[16] Throughout

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[15] The PBGC Multiemployer Study concluded that multiemployer plans covering 1.3 million workers (15 percent of all multiemployer plan participants) were experiencing financial difficulties that could lead to plan termination before 1988. The cost to the guaranty program of such terminations was estimated to be $4.8 billion. Taking into account only those plans whose insolvency during that period was definitely projected, it was estimated that the guaranty program would incur costs of approximately $560 million. PBGC Multiemployer Study, pp. 2, 15-16, 139-40. As the District Court noted in *Peick*, these projections were based solely on economic data and statistical analyses and did not take into account the additional incentives to terminate that ERISA's original employer liability provisions might provide. 539 F. Supp. at 1031. The Congress also concluded that it was necessary to ensure that presently healthy plans would continue to accumulate sufficient assets to pay their benefit commitments. *Id.* at 1046, n. 41.

[16] It is true that relatively few multiemployer plans had as yet terminated when Congress acted on this legislation. However, the fact is that multiemployer pension plans saw their greatest expan-

the Congressional hearings and subsequent legislative process it was clear that representatives of affected employers, labor unions and multiemployer plans were widely agreed on the danger to multiemployer plans and the Federal guaranty program, absent a major restructuring of the current law.[17] A number of these groups, including the NCCMP, participated in the hearings held by four Congressional committees, and went on record concerning the need for legislative action.

The urgent need for Congressional action was demonstrated by the extensive analysis presented by the NCCMP,[18] which substantiated the PBGC's conclusions. Equally significant, these legislative imperatives were attested to by the ERISA Industry Committee, an association of some 100 major corporations that maintain both single employer and multiemployer plans:

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sion during the 1950's and 1960's; it was some years before certain industries in which these plans had initially flourished began to decline and before the number of retirees reached levels that became burdensome for the plans in such industries. Prior to ERISA, moreover, financially troubled multiemployer plans were able to cope with their difficulties by such means as deferral of funding, reduction of previously-earned benefits and the adoption of more stringent vesting and eligibility rules. Once ERISA foreclosed these options, the financial plight of such plans became more apparent. *See*, PBGC Multiemployer Study, p. 4; and H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 54 (1980).

[17] There were repeated references throughout the legislative process to what Congressman Thompson described as "the support of a broad coalition of labor and management groups representing workers and employers in the industries in which multiemployer plans predominate." 126 Cong. Rec. H3947 (daily ed., May 21, 1980). *See also*, H.R. Rep. 869, Part I, 96th Cong., 2d Sess. 63; and Remarks of Senator Williams, 126 Cong. Rec. S10098 (daily ed., July 29, 1980). Senator Javits, another sponsor of the legislation, cited a list of organizations which were supportive of the provisions Congress was about to adopt. 126 Cong. Rec. S10100 (daily ed., July 29, 1980).

[18] Senate Labor Committee Hearings, pp. 164-227.

> We believe such legislation is essential. Under present law the [PBGC] multiemployer fu[illegible] faces the prospect of several billion dollars of de[illegible]ncy within the early years of automatic cove[illegible]. The unintended consequence of present l[illegible]ould surely go against every principle already [illegible]entified; it would accept, and indeed encourage and reward termination of multiemployer plans, it would drive up premiums enormously, and thereby force more plan terminations, and shrink the premium base; and that, in turn, would inevitably require some form of passing the unmet costs of multiemployer plan insurance to others outside the multiemployer plan universe . . . .[19]

Such testimony from employers and unions most affected by both then-current law, as well as the proposed changes, compellingly confirmed for Congress the conclusion that legislative change was essential.[20] The need for

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[19] *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. 104 (1980). For testimony of other witnesses from industries in which multiemployer plans are prevalent, *see, e.g.*, Senate Labor Committee Hearings at 462 (United Mineworkers of America), at 504 (United Food and Commercial Workers), at 594 (Bituminous Coal Operators Association). *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980), at 89 (Master Contracting Stevedore Association of the Pacific Coast), at 93 (Food Marketing Institute), at 132 (National Construction Employers Council). Each of these employer and labor organizations advocated legislative change and supported the general approach of the PBGC proposals.

[20] This is not to suggest that each witness supported all of the Administration's proposals. When Congressional committee hearings were held on those proposals a number of witnesses, while supporting their basic thrust, nonetheless urged various modifications to eliminate potential inequities or to make them more workable. Consideration of such modifications engaged much of the subsequent legislative process, resulting in a final product which had the endorsement of the organizations listed by Senator Javits, n. 13 at 13, *supra*. *See, Peick*, 539 F. Supp. at 1052, n. 62.

change was particularly evident since support for proposed changes included employer representatives who do not normally welcome legislation imposing new burdens and who, in other legislative contexts, are frequently in opposition to the labor supporters of such measures.

B. The Adoption of Withdrawal Liability Was Part of Congress' Comprehensive Effort to Overcome the Problems Facing Multiemployer Pension Plans and the Federal Benefit Guaranty Program.

The legislation fashioned through three years of study by the PBGC and intensive consideration by Congress represents a painstaking effort to treat, in a comprehensive and balanced fashion, the various factors which threatened the stability of multiemployer plans and the viability of the federal guaranty program.[21] Those provisions, described in detail in Appellee PBGC's brief and in the District Court's opinion in *Peick, supra*, demonstrate the statutory purpose to promote the continuation, rather than the termination, of multiemployer plans by providing for their improved funding, and for the elimination of incentives that encourage employer withdrawal and foster plan decline.

In the process, Congress "spread the pain around." *Peick, supra*, 539 F. Supp. at 1052. Employers who continue to contribute when others withdraw from a plan are relieved of some of the burden of funding the debt of withdrawn employers, a burden with which they had been saddled under ERISA as originally enacted. While the MPPAA shifted a significant part of that burden to withdrawn employers, a portion of the "pain" was also allocated to employee participants who now face lower

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[21] This Court, noting the Congressional finding respecting the adverse effects of employer withdrawals, has described MPPAA as an effort "to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans"—thereby implementing "express congressional policy favoring multiemployer trusts." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 338, n. 22 (1981).

guarantees and the possibility of benefit reductions if their plans are in financial difficulty. And, the entire universe of multiemployer plans will pay, through higher premiums, to support the PBGC's guaranty program.

While Congress determined that certain provisions of the MPPAA, like withdrawal liability, were essential to multiemployer plan stability, it also made every reasonable effort to moderate the impact of the rules. In so doing Congress demonstrated its intent to impose liability "only to the extent necessary to achieve the legislative purpose," thus confirming the rationality of its legislative efforts. *Nachman Corp. v. PBGC*, 592 F.2d 947, 962 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

In assessing the impact that any given withdrawal will have on a multiemployer plan, Congress recognized the need to examine the extent to which the plan loses a portion of its contribution base as a consequence of an employer withdrawal. A cessation of an employer's participation that does not involve an erosion of that base—because, *e.g.*, another employer has effectively stepped into the withdrawing employer's shoes—is not likely to have a destabilizing effect.

Although there are enormous practical difficulties in crafting statutory rules to distinguish between the effects of various withdrawals, Congress undertook to make this distinction to the extent possible.[22] One result of that

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[22] The difficulties of formulating statutory provisions that generally distinguish between withdrawals that are harmful to a plan and those that are not are exemplified by 29 U.S.C. § 1383(d). That provision was designed to provide contributors to trucking industry plans an exclusion for withdrawals if "the plan's contribution base does not suffer substantial damage." *See*, 126 Cong. Rec. S11671-72 (daily ed., August 26 1980) (Remarks of Senator Durenberger). Despite the efforts of the legislators to develop a generally applicable statutory test, they could find no alternative but to make the exclusion of any individual withdrawal dependent upon the PBGC, within five years, determining that the plan had not suffered such damage.

effort was the "sale of assets" rule found at 29 U.S.C. § 1384. Under that provision a withdrawal is deemed not to have occurred when an employer ceases to contribute as a result of the sale of its business assets to another party, provided that the purchaser assumes the obligation to contribute to the plan for substantially an equivalent number of employees and meets certain other conditions protective of the plan.

Congress also concluded that in some industries the nature of employment is such that an employer's cessation of contributions is unlikely to reduce a plan's contribution base. It felt sufficiently confident about two such industries—construction and entertainment—to provide special statutory rules. In those two industries, Congress found that contributing employers customarily operate on a project-by-project basis; since employees are generally tied to the industry rather than to a particular employer, an employer's cessation of contributions ordinarily does not adversely affect the plan's contribution base. Accordingly, in those two industries the only event defined as a "withdrawal" is the one that Congress concluded is likely to remove a portion of a plan's contribution base—an employer's cessation of contributions accompanied by its continuation or resumption, within the applicable jurisdiction, of the type of work covered by the plan. 29 U.S.C. § 1383(b) and (c).

One of the most significant moderating provisions applicable to withdrawals—particularly for smaller employers and those whose contacts with a plan have been limited—is the "*de minimis*" exemption. In general, this provision exempts all withdrawal liability amounts under $50,000, and a portion of any amounts between $50,000 and $150,000, thus affecting many withdrawal liability assessments. *See, Peick, supra,* 539 F. Supp. at 1050. In addition, each plan has the option to adopt a higher *de minimis* rule—exempting amounts under $100,000 and reducing amounts between $100,000 and $250,000. 29 U.S.C. § 1389.

Another important feature applicable to all withdrawals—clearly an improvement on ERISA's original liability rules from the standpoint of the employer—is that the MPPAA does not require liability to be paid in a lump sum.[23] The basic rule is that the total amount is to be amortized and paid in installments based on the employer's historic levels of plan contributions. 29 U.S.C. § 1399(c). If more than 20 years are required to amortize such liability on this basis, the payments for the remaining liability are forgiven. In addition to the statutory provisions for amortization of the liability, plan trustees may further adjust the terms of payment pursuant to their broad discretion to "adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability." 29 U.S.C. § 1404.

Other significant moderating features added by the MPPAA include: a general provision permitting the PBGC to prescribe regulations under which plans in other industries may adopt special withdrawal rules similar to the rules applicable to the construction and entertainment industries, 29 U.S.C. § 1383(f); a special net worth limitation on the liability of an employer which sells substantially all of its assets, 29 U.S.C. § 1405(a); the exemption of certain property of a sole proprietor or partner from the collection of liability, 29 U.S.C. § 1405(c); and two changes that help preserve an employer's ability to obtain credit: the tax lien priority the PBGC enjoyed under prior law for termination liability has been eliminated; in addition, the plan has general creditor status only as to 50 percent of the withdrawal liability of an insolvent employer undergoing liquidation, 29 U.S.C.

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[23] The original Title IV rule on employer liability—which still applies to single employer plans—requires its payment in a lump sum. While the PBGC has discretionary authority to grant reasonable terms, its implementing regulation states that it will do so only when necessary to avoid the imposition of a severe hardship, and then only when it appears the employer is able to satisfy those terms and pay the entire liability. 29 C.F.R. 2662.8.

§ 1405(b). Yet another moderating feature allows a plan to be amended to permit a reduction or waiver of liability for a withdrawn employer "which resumes covered operations under the plan or renews an obligation to contribute under the plan." 29 U.S.C. § 1387(b).

C. The Imposition of Withdrawal Liability Was Consistent with the Comprehensive Scheme to Protect the Continuing Viability of Multiemployer Plans.

The concept of withdrawal liability is an integral feature of the MPPAA's comprehensive scheme to protect multiemployer plans and the participants who rely upon those plans for some degree of financial security upon retirement. This Court has left no doubt that, both prospectively and retroactively, the application of withdrawal liability was "itself justified by a rational legislative purpose." *R. A. Gray, supra*, 104 S.Ct. at 2720. That finding of reasonableness is no less determinative with respect to a finding of constitutionality under the Takings Clause here than it was for purposes of the Court's Due Process Clause analysis in *R.A. Gray.*[24] Moreover, as we show below, the statute is fully consistent with other Takings Clause tests which have been fashioned by this Court.

1. *The Character of the Governmental Action.*

In *Penn Central, supra*, 438 U.S. at 124, the Court noted that one of the factors having "particular significance" in Takings Clause cases is "the character of the governmental action." *Id. Penn Central* established that a particular governmental act is far more susceptible to classification as a "taking"

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[24] The Court in *Locke, supra*, grounded much of its opinion on an extensive analysis of the reasonableness of the statutory provisions at issue. It concluded that the regulation of private property rights was not an unconstitutional "taking" "as long as the legislative scheme is *a* rational way of reaching Congress' objectives . . . ." 105 S.Ct. 1800.

> when the interference with property can be characterized as a physical invasion by government, see, *e.g.*, *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 648.

It defies all reason to suggest that ERISA and the MPPAA by their character, or even by operative effect are physically invasive. The statutory outcome in question, *i.e.*, the imposition of withdrawal liability, does not even go so far as those laws and regulations adversely affecting or destroying real property albeit that even that type of regulatory act has been upheld by the Court as reasonably promoting "health", "safety", "morals" or "the general welfare". *See, e.g., Nectow v. Cambridge*, 277 U.S. 183 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). To the contrary, the objectives of the MPPAA are identical to those situations where Congress saw that its failure to act would have a "disruptive effect" on the nation's social fabric and our economic institutions. Thus, just as with Congressionally-mandated prohibitions against racial discrimination in public accommodations, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), or the Congressionally-authorized imposition of the union shop in railway collective bargaining agreements, *Ry. Employees' Dept., A.F.L. v. Hanson*, 352 U.S. 225 (1956), or the Congressionally-mandated imposition of wage, price and rent controls, *Bowles v. Willingham*, 321 U.S. 505 (1944), the imposition of withdrawal liability as part of the MPPAA's overall design to protect the vitality of multiemployer pension plans is simply not unconstitutionally invasive under the Takings Clause.[25]

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[25] Even the total destruction of a business has been held not to be a taking where there is a permissible act or regulation by the

Appellants attempt to obfuscate the character of the governmental action here by concentrating solely on the withdrawal liability provisions of the statute as if to suggest that the assessment of that liability is all that is involved here. But, as we have amply demonstrated above, withdrawal liability is but one element in a carefully crafted regulatory mechanism designed to protect the interests of multiemployer plans, their participants and beneficiaries and those employers who continue to participate in the plans. Withdrawal liability is simply not isolable in the manner which Appellants advocate. In matters such as retirement security which necessarily involve relationships between employers and the employed, "the legislature has necessarily a wide field of discretion . . . that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." *West Coast Hotel, supra,* 300 U.S. at 393. Because the MPPAA is the product of that type of legislative decisionmaking, withdrawal liability and its other ameliorative provisions must be viewed in that wide regulatory context.

2. *The Economic Impact.*

Another factor which the Court has examined in the Takings Clause cases is the "economic impact" of the regulations or statute in question. *Penn Central, supra,* 438 U.S. at 124. Here, too, Appellants would have the Court approach its analysis with tunnel vision. As we have shown, withdrawal liability was not the only economic consequence of the enactment of the MPPAA. Multiemployer plans themselves are required to pay a more

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government, and the impairment or destruction of the business is merely incidental to that act. *See, Mitchell v. United States,* 267 U.S. 341 (1925); *Tempel v. United States,* 248 U.S. 121 (1918) (holding that although the taking of real property is compensable, the destruction of a business incidental to the taking of real property under the Tucker Act is not compensable where the intention to destroy the business is lacking).

than five-hundred percent increase in premiums to support the benefit guaranty program. In addition, plan participants are required to make the sacrifice of accepting lower benefit guaranties in the event of a plan termination. Thus, for the principal purpose of preserving a significant segment of our nation's private system of retirement security, Congress did what it has traditionally done in matters of this nature—it enacted a regulatory scheme which adjusted economic benefits and burdens among all affected groups. None of the regulated parties was singled out for harsher treatment as Appellants suggest. Moreover, it is now well settled that "[w]ithdrawal liability attaches, not as a punishment for the employer's malice or willfulness in withdrawing from the plan, but to protect the vested pension interests of the employees." *Bd. of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1407 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2116 (1985).

Further, the MPPAA does not require an assessment of withdrawal liability without regard to the relationship between the employer and the plan to which he had made contributions. There exists a carefully crafted statutory formula for the calculation of a withdrawn employer's liability which is based upon that employer's actual experience with the plan. 29 U.S.C. § 1391. Moreover, to the extent that there is a dispute between the employer and the plan as to the amount of liability assessed, the MPPAA provides for the impartial arbitration of such disputes. 29 U.S.C. § 1401. And, as has been set forth at length above, there are a plethora of statutory provisions which moderate and mitigate the economic impact of withdrawal liability.

3. *Interference With Investment-Backed Expectations.*

Yet another factor which the Court has examined under the Takings Clause is whether the governmental action at issue has "interfered with distinct investment-backed

expectations." *Penn Central, supra,* 438 U.S. at 124. Inherent in this concept is that the possessors of the "property right" have a reasonable belief that they have made an economic investment which cannot be legislatively regulated or the value of which cannot be legislatively diminished without fair compensation from the government. However, even by the time modern-day economic regulation had reached its adolescence, this Court had begun to recognize that the Takings Clause "cannot be pressed to its grammatical extreme; . . . that some play must be allowed to the joints if the machine is to work." *Tyson & Bros. v. Bantam,* 273 U.S. 418, 446 (1927) (Holmes, J., dissenting). And even where there is some legitimate property right at stake, the Court has most recently acknowledged that "[r]egulation of property rights does not 'take' private property when an individual's reasonable investment-backed expectations can continue to be realized as long as he complies with the reasonable regulatory restrictions the legislature has imposed." *Locke, supra,* 105 S.Ct. at 1799. Thus, loss of future profits or a mere lessening of value resulting from governmental regulation of economic relationships have not been viewed as interference with investment-backed expectations. *See, Andrus v. Allard,* 444 U.S. 551 (1979); *Jacob Rupert, Inc. v. Caffey,* 251 U.S. 264 (1920).[26]

So, too, where an employer has voluntarily entered into a relationship requiring his participation in a multi-employer pension plan the fact that his withdrawal from the plan may result in the imposition of certain financial liabilities is no different than any other obligations which the employer might incur as the result of the wide range of governmental actions which regulate the conduct of

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[26] The Court has said that if permissible regulations so severely impair a business' profit-making capacity, that the business is free to cease operating; there is no taking. *Erie RR Co. v. Bd. of Public Utility Comrs.,* 254 U.S. 394 (1921), cf. *Brooks-Scanlon Co. v. RR Commission,* 251 U.S. 396 (1920).

the employer's business. Indeed, one of the risks of entrepreneurship is that some day the bills may be larger than anticipated or that there might not be enough money in the accounts to pay all the bills. But, conversely the driving force which causes the entrepreneur to take the risk is the possibility that there are profits to be made.

Appellants assert that the enactment of the MPPAA upset all of their reasonably held expectations that the only employer obligation to a multiemployer plan is to make contributions to the plan during the life of the collective bargaining agreement. Whenever the agreement to make contributions is extinguished, say Appellants, any additional financial obligations imposed by the government constitute an interference with what they had earlier bargained for. But this Court has already visited—and rejected—Appellants' argument. *R. A. Gray, supra,* 104 S.Ct. at 2718-19. When ERISA was enacted in 1974, withdrawn employers were made subject to the imposition of contingent liability. *R. A. Gray, supra,* 104 S.Ct. at 2270. The Administration recommended the MPPAA and the Congress enacted it for the simple reason that the prior regulatory scheme was not working as it was designed to work. To correct the deficiencies in the earlier law, Congress merely strengthened the regulatory framework which it found was not having the desired effect.

Nor can it be said that employers had reason to expect that the private retirement income security system was an area of regulation which is static or which had just arisen in 1974. Pension plans had been the subject of changing Federal regulation since at least 1921 when Congress provided favorable tax treatment to foster the growth and development of these vital programs in the private sector. IRC § 401 (1954); IRC §165 (1939); IRC § 219 (1921); *see also, Peick, supra,* 539 F. Supp. at 1044-45. During the Second World War, pursuant to its authority under the Emergency Price Control Act, the National War Labor Board was empowered to, and did in fact, require certain employers to maintain without

alteration their existing pension plans. *See Western Union Co. Case No. 2516-CS-D* (N.W.L.B., January 18, 1943) and *Philadelphia Transportation Co. Case No. 3056-AR* (N.W.L.B., February 11, 1943).[27] By 1948 it was well established that pension benefits were a mandatory part of collective bargaining under the National Labor Relations Act and that the refusal to bargain over such benefits could subject an employer to the severe economic consequences of a work stoppage. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950). And section 302 of the Labor Management Relations Act of 1947 as well as the Welfare and Pension Plans Disclosure Act of 1958 afforded additional clear warning to employers that the federal government might one day act again to regulate in this economic sphere.[28]

It is also not persuasive that many of the collective bargaining agreements establishing an employer's obligation to contribute to a multiemployer plan may have provided that there was no addtional such contribution obligation once the contract terminates. "One whose rights, such as they are, are subject to state restrictions cannot remove them from the power of the State by making a contract about them." *Hudson Co. v. McCarter*, 209 U.S. 349, 357 (1908). That very same principle is reflected in ERISA's regulation of the conduct of pension

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[27] See *The Termination Report of the National War Labor Board, Industrial Dispute and Wage Stabilization in Wartime*, Vol. 1, p. 384, Government Printing Office, 1947.

[28] Even if there had been no history of legislative regulation in this area, that would not make the act unconstitutional. In *Federal Power Comm'n v. Nat'l Gas Pipeline*, 315 U.S. 582, 583 (1942), a statute regulating wholesale gas prices was challenged on Takings Clause grounds. The Court upheld the statute saying, "the business of cross-petitioners is not any the less subject to regulation now because the government has not seen fit to regulate it in the past." *Ibid*, at 683. *Cf. Nebbia v. New York*, 291 U.S. 538 (1934).

plan fiduciaries who, once the statute was enacted, were prohibited from relieving themselves from their fiduciary responsibilities by virtue of exculpatory clauses in the trust instruments. 29 U.S.C. § 1110.[29] This change in a fiduciary's status could well result in the imposition of significant personal liability in the event of a breach of the fiduciary's ERISA duties. And the liability could arise even though the fiduciary breach was the result of an unintentional error or omission. Nonetheless, the government's longstanding regulation of trust duties negates any argument that trustees could reasonably expect to continue to exculpate themselves from liability in the face of ERISA's carefully reticulated regulatory scheme.[30]

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[29] The traditional practice, prior to ERISA, had been for trustees to insulate themselves from liability for breach of fiduciary duties. Congress believed that fiduciaries would adhere to the strict requirements under ERISA if exculpatory clauses were made void under the statute. Congress did permit fiduciaries to purchase insurance to cover liability or losses resulting from their acts or omissions.

[30] The appellants attempt to draw an analogy between withdrawal liability and the interests of creditors holding property rights in collateral, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). But the expectation to be free from liability (whether contracted for or not) is not at all similar to a title in property, a vested security interest. The 7th Circuit put it most aptly in *Peick v. PBGC*, 724 F.2d 1247, 1276 (7th Cir. 1983) *cert denied*, —— U.S. ——, 104 S.Ct. 3554 (1984):

> The contractual rights of the employers in the case before us are in no way analogous to the type of rights in specific property protected under the takings clause. Appellants identify no interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans in which they participate. Because this contractual right in no way constitutes a type of distinct and identifiable "property", we need not even reach the question of whether there was a "taking" in this case.

4. *"Justice and Fairness" are an Integral Element of Withdrawal Liability and the MPPAA's Overall Regulatory Scheme.*

Another approach of the Court under the Takings Clause has been to preserve government's power to regulate "subject only to the dictates of justice and fairness." *Andrus v. Allard, supra,* 444 U.S. at 65. Utilizing "the exercise of judgment," *id.*, in this case compels the conclusion that there is no unconstitutional government conduct here.

Congress' purpose in enacting the MPPAA has been amply demonstrated herein. The imposition of withdrawal liability is but one element of an overall system designed to protect the totality of multiemployer plan interests. And "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

To the extent that withdrawn employers are required to pay a certain share of the unfunded vested obligations of a plan, it is clear that Congress went to great lengths to moderate the impact of such payments and to make the calculations of any amounts ultimately found to be due bear a reasonable relationship to the withdrawn employer's participation in the plan. Indeed, although Appellants complain that employer liability is sometimes "substantial", it is hard to imagine that Congress would have enacted a mechanism which on the one hand would protect the multiemployer retirement system while at the same time intending to destroy the entire fabric of American business.[31] But even if that were the reality, "[t]hat the

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[31] Appellants' pleas in this regard appear a bit like Aesop's shepherd boy who cried "Wolf, Wolf." Indeed, the National Association of Manufacturers in its Amicus brief in this case takes great care to emphasize that the vast majority of all multiemployer plans are financially sound. Brief of Nat'l. Assoc. of Manufacturers as Amicus Curiae in support of appellants, at pp. 9-10. Thus, not only has the MPPAA's overall regulatory scheme succeeded in its purpose but its economic impact is hardly as ruinous as Appellants assert.

[Congress] might be so foolish to kill a goose that lays gold eggs for them has no bearing on their constitutional rights." *Erie Ry. Co. v. Bd. of Public Utility Comm'rs*, 254 U.S. 394, 410 (1927). Moreover, "whether *in fact* [MPPAA] will accomplish its objectives is not the question: the [Takings Clause] is satisfied if . . . the [Congress] *rationally could have believed* that [the withdrawal liability provisions] would promote [MPPAA's] objective. *Western & S.L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 672 (1981).

CONCLUSION

For the foregoing reasons, the NCCMP urges this Court to affirm the decision of the Three Judge Court in this case.

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